85-1197

Supreme Court, U.S.
FILED
JAN 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE HONORABLE HARRY EUGENE CLAIBORNE,
UNITED STATES DISTRICT JUDGE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT S. CATZ
Cleveland Marshall
College of Law
Cleveland, Ohio

OSCAR B. GOODMAN
Goodman, Terry,
Stein & Quintana
Las Vegas, Nevada

TERENCE J. ANDERSON
Counsel of record
c/o University of Miami
School of Law
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-2971

Attorneys for
The Honorable Harry Eugene Claiborne,
Petitioner.

JANUARY 15, 1986

75 pp

QUESTIONS PRESENTED

1. Does not the constitutional allocation of powers and the purposes for which that allocation was adopted require that impeachment and removal by Congress precede the exercise of discretionary power by the Executive to prosecute and thereby compel the federal courts to try a United States judge on charges that he committed high crimes in office with the attendant risk that he may be convicted and imprisoned while still in office?

2. Does not the fact that the Executive clearly could exercise its prosecutorial powers to chill and undermine the independence of federal judges impose upon a federal court a duty to afford an accused federal judge an opportunity to prove substantial and specific allegations that officers of the Execu-

tive misused their powers and those of the grand jury to obtain the indictment and were motivated in fact by an intent to drive the accused judge from office and punish him for the manner in which he had exercised the judicial power?

3. May a trial court withhold and deny a defendant any opportunity to use summaries prepared by FBI and IRS agents of pretrial statements made by prosecution witnesses, including summaries showing that a key witness for the prosecution had made pretrial statements that directly contradicted crucial testimony he gave at trial?*

---

* The caption lists all parties to the proceedings in the court of appeals. Petitioner notes here, as he did in the courts below, that all federal judges have interests that will be substantially affected by the disposition of the questions presented here.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
Statement of Material Facts . .	6
The Prior Proceedings	22
REASONS WHY REVIEW SHOULD BE GRANTED	31
I. The First Question Presented	33
II. The Second Question Presented	44
III. The Third Question Presented	56

TABLE OF AUTHORITIES

Cases	Pages Cited
Brady v. Maryland, 373 U.S. 83 (1963)	passim
Butz v. Economou, 438 U.S. 478 (1978)	48
Campbell v. United States, 365 U.S. 85 (1963)	passim
Campbell v. Unites States, 373 U.S. 487 (1963)	xx
Claiborne v. United States, 104 S.Ct. 1401 (1984) (Rehnquist, Circuit Justice in Chambers)	25
Davis v. Alaska, 415 U.S. 309 (1974)	54
Goldberg v. United States, 425 U.S. 94 (1976).	passim
Gravel v. United States, 408 U.S. 606 (1972)	47
Hampton v. United States, 425 U.S. 484 (1976)	50
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	48
Hastings v. Judicial Conference of the United States, 707 F.2d 1093, 1104-05 (D.C. Cir. 1985) (Edwards, Circuit Judge, concurring)	53

Cases	Pages Cited
Nixon v. Fitzgerald, 457 U.S. 731 (1982)	47
Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)	35
Pulliam v. Allen, 104 S.Ct. 1970 (1984)	35
United States v. Agurs, 427 U.S. 97 (1976)	63
United States v. Bagley, 105 S.Ct. 3375 (1985)	54
United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974) . .	50
United States v. Brewster, 408 U.S. 501 (1972)	44,46
United States v. Claiborne, 727 F.2d 842 (9th Cir.), cert. denied, 105 S. Ct. 113 (1984) .	2
United States v. Claiborne, 765 F.2d 784 (9th Cir. 1985) . .	passim
United States v. Conforte, 624 F.2d 869 (9th Cir.), cert. denied, 449 U.S. 1012 (1980) . .	11
United States v. Falk, 479 F.2d 66 (7th Cir. 1973) . .	50

Cases	Pages Cited
United States v. Hastings, 681 F.2d 706, (11th Cir. 1982) cert. denied, 459 U.S. 1203 (1983)	passim
United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974)	34
Unites States v. Manton, 107 F.2d 834 (2d Cir. 1939), cert. denied, 309 U.S. 664 (1940)	34
United States v. Nixon, 418 U.S. 200 (1974)	46
United States v. Robinson, 361 U.S. 220 (1960)	11
United States v. Russell, 411 U.S. 423 (1973)	50

Constitution & Statutes

United States Constitution,	
Art. I, II and III	3-4
Art. I, §6, cl. 1,	46
Amend. V and VI	4
18 U.S.C. § 3500 (1982)	4,27
28 U.S.C. § 455 (1982)	4
28 U.S.C. § 1254(1) (1982)	3

Constitution & Statutes	Pages Cited
28 U.S.C. § 1291 (1982)	24
Fed. R. Crim. P. 26.2	4
Fed. R. Crim. P. 35(b)	11
Fed. R. Crim. P. 40	11

Other Authorities:

Act of Settlement, 1700, 12 & 13 Will. 3, ch. 2 & 3	xx
Annual Report of the Director of the Administrative Office of the United States Courts . .	43
Borkin, J., The Corrupt Judge (1962)	34
Brief for Appellee United States of America, United States v. Hastings, 681 F.2d 706 (11th Cir. 1982)	40
The Federalist No. 79 (Hamilton) .	37
Judicial Tenure and Discipline--1979-80: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st and 2d Sess. (Comm. Print 1980)	41

Other Authorities	Pages Cited

Note, Indictment of Federal Judges: Chilling Judicial Independence, 35 U.Fla. L.Rev. 296 (1983) 54

Petition for Writ of Certiorari, Claiborne v. United States, 105 S.Ct. 113 (1984) (cert. denied) 53

Petition for Writ of Certiorari, Hastings v. Investigating Committee of the Judicial Council of the Eleventh Circuit, 105 U.S. 254 (1984), (cert. denied) 53

Petition for Writ of Certiorari, Hasting v. United States, 459 U.S. 1203, (cert. denied) . . . 35

Pike, D., Judicial Discipline on Trial, Nat'l L.J., Dec. 19, 1983, at 1, 26-27 54

Riley, J., The Deal Conforte Cut: Is it Legal?, Nat'l L.J., Jan. 23, 1984, at 30 35,54

Riley, J., Stacked Deck for a Judge? Focus Shifts to Probe Tactics, Nat'l L.J., Jan. 23, 1984, at 1 35

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1985

THE HONORABLE HARRY EUGENE CLAIBORNE,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United States District Judge Harry Eugene Claiborne petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment that court entered against him.

OPINIONS BELOW

In January 1984, the district court entered an order denying petitioner's motion to quash the indictment and

dismiss the proceedings (A. 176). That decision was not reported. A special panel sitting as the court of appeals affirmed the district court's decision and remanded the case for trial (A. 86-124). That decision was reported. United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984) ("Claiborne I").

After the second trial, the district court entered a judgment of conviction upon a jury verdict, denied petitioner's motion for a judgment of acquittal or a new trial, and sentenced petitioner to a term of imprisonment. A different special panel, again sitting by designation, affirmed the conviction (A. 1-85). That decision has been reported. United States v. Claiborne, 765 F.2d 784 (9th Cir. 1985) ("Claiborne II"). One of the judges in active service on the court of appeals who had not disqualified themselves dissented

from that court's denial of petitioner's suggestion that the appeal be reheard en banc (A. 127-35). That opinion has not yet been reported.

JURISDICTIONAL STATEMENT

This petition seeks review of a judgment that the United States Court of Appeals entered on July 8, 1985. The petition for rehearing and suggestion for rehearing en banc were denied on December 10, 1985 (A. 125-26). The present petition was filed on January 15, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first two questions presented concern the proper construction of the provisions of the United States Constitution governing the tenure and removal of federal judges. U.S. Const., art.

III, § 1; art. I, § 2, cl. 5, and § 3, cl. 6 and cl. 7; and art. II, § 4. In order to resolve those questions, the Court will also have to construe provisions of the Constitution intended to allocate and keep separate the powers of the three branches of government (U.S. Const., art. I, § 1; art. II, § 1, cl. 1, § 2, cl. 1 and cl. 2, and § 3; and art. III, § 1 and § 2, cl. 1 and cl. 3) and the statute codifying the requirements for impartiality [28 U.S.C. § 455 (1982)]. The third question presented raises issues concerning the proper application of the Due Process and Confrontation Clauses of the Constitution (U.S. Const. Amends. V and VI) and the provisions of the Jencks Act [18 U.S.C. § 3500 (1982)], as incorporated as Rule 26.2 of the Federal Rules of Criminal Procedure (collectively, the "Jencks Act").

These provisions have been included in the appendix to this petition (A. 177-92).

STATEMENT OF THE CASE

Petitioner is the third United States district judge in active service that the Executive has prosecuted for his conduct in office during the past three years. He is the first of these that has been convicted. He is also the first to be sentenced to a term of imprisonment that will effectively remove him from his office for the period of his incarceration. He has not resigned and does not intend to resign from office until he has obtained vindication in the courts or in the House and Senate.

The present petition presents this Court an opportunity to review and resolve fundamental constitutional issues raised by the prosecution and trial of sitting federal judges on a completed record. In

petitioner's view that record demonstrates the need for such review to assure not only that these fundamental questions are finally resolved, but also that this Court has an opportunity to examine the procedures by which one judge was indicted, tried, and convicted so that it can exercise its supervisory powers to provide authoritative guidance on how future proceedings are to be conducted, if it finds such proceedings are constitutionally permissible. In order to frame those issues adequately and to demonstrate the need for this Court to exercise its supervisory powers, petitioner's counsel found it necessary to present a more extensive statement of the case than might otherwise have been appropriate.

Statement of Material Facts

1. The facts necessary to an understanding of the first question presented

may be simply stated. Harry Eugene Claiborne was duly appointed to serve and took office as a district judge of the United States District Court for the District of Nevada in 1978. On December 8, 1983, attorneys for the United States filed an indictment that alleged that Judge Claiborne has committed seven felony crimes (A. 137-48). The indictment alleged that each of those crimes was committed while Judge Claiborne was in active service as a United States district judge. Judge Claiborne was ultimately convicted on two counts of willfully and intentionally filing false income tax returns after his appointment to the bench. The trial judge sentenced Judge Claiborne to two concurrent two-year terms of imprisonment and recommended that he be incarcerated in Bureau Prison's facility at Maxwell Air Force Base in Alabama.

Judge Claiborne has not resigned from office.

2. The material facts necessary to a proper understanding of the second question presented are more complex. Because the trial court denied the motion by which Judge Claiborne presented this question to it without hearing evidence, the facts alleged and proffered (see A. 149-76) must be accepted as true. Thus only the central allegations and proffers need be described here.[1]

The FBI opposed the nomination and appointment of Judge Claiborne because of his extensive activity, success, and prominence as a criminal defense lawyer.

---

1. Petitioner filed with this Court a substantial appendix in support of his Emergency Application for Stay or Writ of Injunction to Protect this Court's Jurisdiction, Claiborne v. United States, No. A-725 (1984). The material facts are reported in some detail with specific references to materials then in the record below in that appendix at pages 83-97.

The President and the Senate rejected the FBI's recommendation, and Judge Claiborne was duly appointed and took office. Thereafter, agents working with the Justice Department's Organized Crime Strike Force in Nevada made no attempt to conceal the disdain with which they viewed Judge Claiborne, his colleague on the district bench, and leading members of the Nevada defense bar. What was initially concealed was the fact that subordinate officials of the Strike Force and the FBI had continued to investigate Judge Claiborne after he assumed office. Published reports and the evidence proffered by Judge Claiborne showed that even prior to the investigations leading to the indictment below, federal officials had misused their powers and those of at least one grand jury to induce witnesses to provide information against Judge Claiborne, to intimidate those who declined

to cooperate or who had supported his nomination, and to intercept mail and telephone communications between Judge Claiborne and others.

Far more significant abuses occurred in the investigation that ultimately produced the indictment below. Strike Force and FBI officials learned that a fugitive brothel owner, Joseph Conforte, had offered to provide information against Judge Claiborne in exchange for a reduction in sentence and assistance in reducing the liability that resulted from his conviction on four counts of tax evasion and his exposure on other charges then being investigated by the State of Nevada. In order to make a deal with Conforte, however, these officials had to overcome two major obstacles. First, the Nevada district director of the Internal Review Service, Gerald Swanson, was opposed to

any settlement that rewarded a convicted felon who had fled to Brazil to avoid criminal and civil liability for his failure to pay taxes, a liability amounting to some twenty million dollars. Second, Conforte had fled in 1980, immediately after this Court had declined to review the court of appeals's judgment affirming his conviction on four counts of tax evasion and a five-year sentence of imprisonment on one of those counts.[2] More than 120 days had elapsed since the judgment has become final. Thus, Rules 35(b) and 40 of the Federal Rules of Criminal Procedure; decisions such as United States v. Robinson, 361 U.S. 220 (1960), and its progeny; and established Justice Department policy seemingly precluded any reduction in the five-year

---

2. United States v. Conforte, 624 F.2d 869 (9th Cir.), cert. denied 449 U.S. 1012 (Dec. 1, 1980).

sentence. The manner in which these obstacles were overcome illustrates the magnitude of the abuses these subordinate federal officials employed and evidences the intent they harbored against Judge Claiborne.

To remove director Swanson, the officials set up a sting operation against him. Although the sting resulted in Swanson's transfer from the district of Nevada, the tactics employed were so outrageous that internal investigations by both the Justice Department and the Treasury resulted in reports condemning the tactics used and the results achieved. Indeed, the Treasury report concluded not only that Swanson had done nothing improper, but also that the investigating and prosecuting officials had improperly induced a grand jury to indict an innocent man and had exercised their powers to

force him to plead guilty to a crime he had not committed.

The second obstacle ultimately proved less substantial. A week after Conforte returned and testified before a Nevada grand jury, the prosecutor in this case presented a motion for a reduction of Conforte's sentence to a United States district judge in Washington, D.C., sitting by designation as a judge of the district of Nevada. Three years after this Court had declined to review the sentence, and more than two-and-a-half years after Conforte's original motion for reduction in sentence had been denied,[3] the designated judge granted the prosecutor's motion and reduced the five-year sentence to fifteen months.

---

3. United States v. Conforte, Civ-R-77-24-ECR (D. Nev. Apr. 1, 1981) (five-page order and opinion denying Conforte's Rule 35 Motion for reduction in sentence by Reed, D.J.).

Between the start of the Conforte-based investigation and the return of the indictment, the officials conducting the investigation employed three grand juries. They had FBI agents improperly sworn as agents of the grand jury, and these agents admittedly misused their powers as grand jury agents. They had Conforte testify that he had given Judge Claiborne a bribe in the face of statements by the two former assistant United States attorneys that they had won the case in which the bribe was allegedly paid and that there had been no attempt by Judge Claiborne to improperly influence them. They did not call either of these attorneys to testify before the grand jury. Moreover, when one of Judge Claiborne's accountants advised the prosecutors that he wished to return to the grand jury to clarify his testimony, they withdrew his subpoena and

advised him that he was a target in order to prevent further testimony. The testimony Conforte gave at the first trial was so inherently incredible and fraught with inconsistencies that the prosecutors abandoned the Conforte counts. Nonetheless, it was the third grand jury, the one that heard the unchallenged version of Conforte's testimony, that was finally persuaded to indict Judge Claiborne for criminal tax evasion as well as for the Conforte-alleged corruption.

The motion Judge Claiborne filed and the affidavits, exhibits, and proffers he tendered to support it alleged that the indictment had been the product of a three-year war by Nevada Strike Force and FBI officials to drive him from the bench. That motion identified specific witnesses and documents he would subpoena and present to provide competent evidence

to prove his allegations. The foregoing summary describes only the major allegations that he made in support of his claim in order to make clear their nature and substantiality.

3. The facts necessary to understand the third question presented are not subject to dispute. Judge Claiborne was prosecuted and convicted on charges that he had signed and filed income tax returns in 1980 and in 1981 which he knew did not report amounts that he had received as professional income in the preceding years. There was no dispute over the fact that each return failed to accurately report or include money that Judge Claiborne had in fact received and that was properly taxable to him as income. Judge Claiborne denied, however, that he had had any intent to file a fraudulent report and claimed that he had relied upon his

accountants, Joseph Wright and his wife Connie, who had kept his books and who had prepared his income tax returns until 1980, and Jerry Watson, d/b/a Creative Tax Planning, who had advised him and prepared the 1980 return that was filed in 1981.

Both Judge Claiborne's credibility and his defense rested in large measure on his testimony that he had disclosed to his accountants income that was not reported on his returns. Judge Claiborne testified that on April 11, 1980, he had written to Wright informing him that he had received $41,000 during 1979 from fees earned before he became a judge. Judge Claiborne's secretary testified that she had personally delivered this letter to Wright's office. Wright, however, was called by the prosecution and testified unequivocally that he had no recollection of ever having seen the letter. Given the

lapse in time, Wright's more damaging assertion was that he had never misplaced or lost any of Judge Claiborne's records or files and that he did not have the letter.[4] Thus the weight the jury attached to Wright's assertions was central to its determination of Judge Claiborne's credibility and thus to his defense. The jury found Judge Claiborne guilty.

More than a month after the trial, the presiding judge made an extraordinary disclosure. Six months earlier, during this first trial, defense counsel noted

---

4. Judge Claiborne testified that he had also disclosed the income he had received from his former practice in 1980 to Watson. Watson testified at trial, and confirmed that the judge had made full disclosure. Watson's testimony was confirmed by his own notes as well as by Judge Claiborne's. Thus, the government's case was dependent upon persuading the jury that Judge Claiborne's testimony was entitled to neither weight nor belief. The primary basis for that claim was Wright's testimony that the 1980 letter was not in his perfectly maintained client files.

that the prosecution had not supplied any FBI reports of interviews with any of the witnesses it had called. The presiding judge recognized that such materials might contain discoverable material and directed the prosecution to submit all such summaries. The prosecuting attorneys then submitted hundreds of documents under seal requesting in camera inspection in response to Judge Claiborne's Jencks Act and Brady discovery requests. At that time the presiding judge expressly represented that he would review all the documents and evaluate all summaries of pretrial witness statements prepared by FBI and IRS agents "as to all witnesses." The only materials he ever released from any of these documents were occasional fragments that an agent had placed in quotation marks.

At the post-trial hearing, however, the presiding judge disclosed that he

had never completed the promised review. It was at this hearing that Defendant first learned that "hundreds" of interview reports existed that had been submitted by the prosecution, but never reviewed by the court. These materials included five pages of summaries prepared from three interviews with Wright.

> COURT: I think I was asked to review 302 forms [FBI interview summaries]. I have no specific recollection of seeing this. I follow the practice, gentlemen, on the upper portion on each of the 302 forms, in the upper left-hand portion you will find WEH, USDJ. That is not appearing here. That's all I can say. I am turning these over to defense counsel and he can examine them and proceed from there. I will take a recess. You may examine those documents. Maybe in the record somewhere, in the pretrial hearings you will find that I did examine it. If so, I tried to summarize it each time. I don't know, there's so many hundreds of them, I can't recall specifically. It may have been done at the hearing that has never been typed up, namely February 21,

> 1984. I don't know. That hearing has never been typed up at the request of anybody. All right. We will take a ten minute break while we examine those documents. (A recess was taken.)

Transcript of Proceedings, October 2, 1984, pp. 60-61 (emphasis added).[5]

The trial judge then presented counsel for Judge Claiborne with sealed envelopes containing numerous unreviewed documents and ordered a ten-minute recess so they could be examined.

It was during that recess that Judge Claiborne learned that FBI and IRS agents had prepared extensive summaries of statements the Wrights had made during three investigative interviews. Those statements disclosed, among other information, that during the investigation Wright had stated that a substantial portion of

---

5. The transcript has been examined. There is no reference to the interview reports.

Judge Claiborne's records had been thrown away when he had moved his office in 1981. That move took place after the 1979 return had been filed and after the Wrights had determined that Judge Claiborne was no longer using either their bookkeeping or tax-preparation services. The ten-minute recess was, however, the only opportunity counsel for Judge Claiborne had to examine these documents before the trial judge ruled that summaries of witness interviews prepared by government investigators did not constitute Jencks Act or Brady material, denied the pending motion, and re-sealed the remaining materials.

The Prior Proceedings

1. The indictment was filed in December 1983. Judge Claiborne promptly filed a motion, supplemented by an extensive proffer, asking the court to quash the indictment and dismiss the proceedings

(A. 149-58). In that motion he asserted two separate constitutional claims. First, he claimed that the constitutional provisions designed to keep separate the powers of government and to protect the independence of the courts required that the impeachment and removal by the Legislative Branch precede the exercise of prosecutorial discretion by the Executive to compel a federal court to exercise criminal jurisdiction over one of its judges. Second, and alternatively, he claimed that, at a minimum, the Constitution prohibited an Executive prosecution initiated specifically for the purpose of punishing a judge for his judicial acts and in retaliation for the manner in which he had exercised the judicial power. He claimed that the rights a judge derived from Article III of the Constitution and the need to prevent the Executive from

impermissibly intervening in the judicial function made it necessary that the court hear evidence in support of the second claim and, if it was proven, prohibit the Executive from proceeding further. The district court considered the motion and the supplemental proffer (A. 159-75) and rejected both claims without receiving evidence (A. 176). Judge Claiborne promptly appealed.

The special panel designated to hear that appeal agreed that Judge Claiborne's first claim presented substantial and unresolved constitutional issues and that the order denying that claim had been a final and appealable order under 28 U.S.C. § 1291 (A. 90-94). The court affirmed the district court on the merits (A. 94-114). The court went on to hold that the district court's denial of Judge Claiborne's

second claim was not appealable (A. 115-16).

Judge Claiborne applied to this Court for a stay of trial proceedings pending the filing and disposition of a petition for writ of certiorari. In denying that application, the Circuit Justice indicated that he "did not believe that four Justices of this Court would vote to grant certiorari to review any one of the claims [asserted in the application] at the present stage of this litigation. Claiborne v. United States, 104 S.Ct. 1401 (1984) (Rehnquist, Circuit Justice, in chambers)(emphasis supplied). Thereafter, the Court denied a renewed application for stay (id. at 1463) and denied the subsequent petition. 105 S. Ct. 113 (1984).

2. The first trial was declared a mistrial because the jury was unable to reach a verdict on any of the counts. On

the prosecution's motion, the district court dismissed the four Conforte-based counts alleged in the indictment with prejudice, and Judge Claiborne was tried a second time on the three remaining counts. The jury found him not guilty on the count alleging that he had filed a false report with the Judicial Ethics Committee, but found him guilty on the two counts alleging he had intentionally filed false income tax returns.

Judge Claiborne moved for a judgment of acquittal or for a new trial. It was at the hearing on that motion that the trial judge disclosed that he had not examined all the material that the prosecutors had submitted for in camera inspection. The cursory post-trial examination permitted by the trial judge revealed that the materials submitted included the summaries of pretrial statements that

defendant's accountant and his wife had made to agents of the Federal Bureau of Investigation and the Internal Revenue Service. Without hearing evidence, the judge ruled, however, that summaries made by government agents did not constitute "statements" within the meaning of the Jencks Act, 18 U.S.C. § 3500, or "exculpatory materials" within the meaning of Brady v. Maryland, 373 U.S. 83 (1963), and thus that his failure to examine or disclose them had not constituted error. He denied Judge Claiborne's motion for a judgment of acquittal or in the alternative a new trial.

3. Three different judges from outside the Ninth Circuit were designated to hear Judge Claiborne's second appeal. This special panel again decided that the Constitution did not require that impeachment and removal precede the prosecution

and trial of a federal judge in his own court (A. 6-8). This special panel summarily rejected as "disingenuous" the claim that the protections mandated by Article III of the Constitution and the separation of powers doctrine provided a separate and enhanced basis that required the district court to hold an evidentiary hearing on Judge Claiborne's allegations that prosecutorial agents had abused their powers and those of the grand jury to drive him from the judicial office and punish him for the manner in which he had exercised the judicial power (A. 8-9). Although it noted that numerous actual and possible abuses and errors in the prosecution and trial had occurred, the special panel rejected that remainder of Judge Claiborne's claims on the ground that the record did not show that the trial judge had abused his broad discretion or that any one of

the claimed errors had had the requisite prejudicial effect (A. 9-85).

As Circuit Judge Ferguson made clear in dissenting from the denial of rehearing en banc (A. 127-35), the special panel misperceived the Jencks Act and Brady issues and the record before it. The panel did not independently review the materials that the trial judge had withheld from the defendant (A. 135). It ruled as a matter of law that the summaries that were before it were not "statements" within the meaning of the Jencks Act (A. 66-68). It acknowledged that the summaries of the accountant's statements were Brady material, but ruled that the trial court's failure to disclose them had not prejudiced defendant's rights sufficiently to require a new trial (A. 70-77).

Judge Claiborne filed a petition asking the special panel to rehear the

case and suggesting that the court of appeals grant rehearing en banc. Although a majority of the judges who had not disqualified themselves did not vote for rehearing en banc (A. 125), Judge Ferguson's dissenting opinion frames the third question presented and sets out important reasons why review should be granted by this Court (A. 127-35).[6]

---

6. The court's decision denying rehearing en banc indicates that there were enough circuit judges in active service in the Ninth Circuit who had not recused themselves to constitute a panel or a quorum for rehearing. That disclosure raises troubling questions concerning the issuance of the certificate of necessity that led to the designation of the two special panels that heard Judge Claiborne's appeals. A sister court had decided that disqualification of all circuit judges was not required as a matter of law when a district judge within the circuit was indicted and appealed in United States v. Hastings, 681 F.2d 706, (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983). It is now unclear why Judge Claiborne was denied the normal random assignment of judges on appeal and was forced to present his case before judges specially selected to hear his appeals.

REASON WHY REVIEW SHOULD BE GRANTED

One reason alone ought suffice to command review in this Court. Judge Claiborne is the fourth United States district judge against whom the Executive has exercised its investigative powers and those of the grand jury since 1981. He is the third of these to be indicted; the second to be tried; and the first to be convicted. He has claimed that the Constitution defines a mandatory sequence of remedies when the Executive alleges that a United States judge has committed high crimes in office, a claim that three circuits have acknowledged to be substantial and unresolved. He has claimed that the Executive misused its powers and those of the grand jury to drive him from judicial office in a manner that is inconsistent with the minimum conditions necessary to preserve judicial indepen-

dence in the federal district courts. He has claimed that the special procedures necessary to try this judge resulted in a trial that was fundamentally unfair and that denied him rights that other individuals accused of crimes must be accorded.

Whatever the proper disposition of these claims on the merits, petitioner submits that this Court should not let this district judge go to jail until it has thoroughly reviewed the claims and satisfied itself that the exercises of executive and judicial powers that produced the conviction below can and did comport with the essential requirements of the Constitution. Whatever the disposition on the merits, petitioner submits that those who serve on the federal trial bench and are most vulnerable to attack are entitled to a definitive resolution that explains those essential requirements

and lays down guidelines for their application in the future. That resolution can only come from this Court. Petitioner submits that that resolution should come before he is forced to enter a federal prison as a United States district judge in active service.

I. The First Question Presented

1. The Court should grant the writ so that it may finally resolve the first question presented. Judge Claiborne is the third United States district judge to be indicted in the past four years for conduct that occurred while he was in office. He is the first to come before this Court who has been convicted for conduct that occurred while he was in office and who has elected to remain in office while he seeks a hearing and vindication -- in the court or before

Congress.[8] Recent investigations and prosecutions by the Justice Department make it clear that the prosecution of federal judges has now become established and institutionalized within the Executive Branch. It is no longer an isolated phenomenon.

This Court has traditionally recognized that judicial independence is sufficiently central to our constitutional

---

8. Marvin Manton had resigned from office before trial and, after his conviction, he sought absolute immunity rather than the sequential application of remedies for malconduct in office. United States v. Manton, 107 F.2d 834 (2d Cir. 1939), cert. denied, 309 U.S. 664 (1940). Otto Kerner was tried and convicted for conduct that occurred while he was Governor of Illinois, before he was appointed judge. Moreover, he did not raise the question presented here until after his conviction. United States v. Isaacs, 493 F.2d 1124 (7th Cir.)(special panel), cert. denied, 417 U.S. 976 (1974). He resigned from office before going to prison. Both prosecutions were isolated instances of a kind that had rarely occurred before the 1980's. See, e.g., J. Borkin, The Corrupt Judge (1962).

scheme of government to command this Court's attention. See, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (lack of Article III protections precludes assignment of compulsory jurisdiction over contract claims to Article I bankruptcy judges), and Pulliam v. Allen, 104 S.Ct. 1970 (1984) (common law immunity does not bar award of declaratory and injunctive relief and attorneys fees under federal civil rights statutes against state court magistrates). The Justices of this Court should be fully aware of the underlying constitutional issues raised by this petition and the practical consequences to the Judiciary. See, e.g., Petition for Writ of Certiorari, Hastings v. United States, 459 U.S. 1203, (1983) ("Hastings Petition") (cert. denied) (similar claim presented). The Executive's exercise of

its claimed powers here has again made the federal judiciary notorious and newsworthy. See, e.g., J. Riley, Stacked Deck for a Judge? Focus Shifts to Probe Tactics, Nat'l L. J., Jan. 23, 1984, at 1, and The Deal Conforte Cut: Is It Legal?, id. at 30 (reporting on alleged abuses leading to the prosecution of Judge Claiborne). In essence, this petition simply asks this Court to act upon that awareness and acknowledge that the fundamental constitutional questions concerning the protections necessary to maintain the constitutionally mandated independence of federal judges are as deserving of this Court's attention as are questions concerning the protections necessary to exercise the federal judicial power to resolve common-law contract disputes or the scope of common-law immunities that must be afforded state court judicial officers.

2. The constitutional questions are fundamental. Pursuant to Articles I, II, and III of the Constitution, Judge Claiborne is entitled to hold office and exercise the judicial power of the United States unless and until he resigns or has been impeached by the House of Representatives and tried and convicted by the Senate of "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const., art. I, § 2, cl. 5, and § 3, cl. 6; art. II, § 4; and art. III, §§ 1 and 2. The framers designed these provisions to protect judges serving on federal courts from coercion or interference by the Executive. They concluded that impeachment and removal by Congress was the only remedy for judicial misconduct "consistent with the necessary independence of a judicial character." The Federalist, No. 79 (Hamilton) 513-14 (Mod. Lib. ed. 1937).

Until recent times the framers' understanding was shared by all three branches of government, here and in England. The Crown has never prosecuted a judge holding good behavior tenure prior to removal or resignation. That constitutional tradition is 285 years old. Act of Settlement, 1700, 12 & 13 Will. 3, ch. 2 & 3. For the first one hundred fifty years of this nation's history, the Executive never attempted to prosecute an Article III judge; charges of serious judicial misconduct were invariably referred to the House of Representatives. See J. Borkin, The Corrupt Judge (1962) (for a summary).

Three circuits have now considered a federal judge's claim that the Constitution defines a mandatory sequence of remedies for alleged criminal misconduct in office. Claiborne I, A. 90-114, and

Claiborne II, A. 6-8; Hastings, 681 F.2d 706, 709-12; and United States v. Isaacs, 493 F.2d 1124,1140-44 (7th Cir.) (special panel), cert. denied, 417 U.S. 976 (1974). All have recognized that the claim presents substantial issues of inter-branch comity that directly effect the independence of Article III judges and that have not been resolved by this Court. Claiborne I, A. 90-114; Claiborne II, 6-8; Hastings, 681 F.2d at 708-09; Isaacs, 493 F.2d at 11, 40-41.

The abortive investigations into Chief Judge Battisti's (N.D. Ohio) conduct of his office and the recently initiated prosecution of Judge Nixon (D. Miss) make it clear that the issue will recur. Whatever the proper resolution, there in nothing to be gained and much to be lost by leaving the issue for circuit-by-circuit resolution. Considerations of

judicial economy as well as a decent respect for the judicial office point toward prompt and final resolution by this Court.

3. The Executive has asserted that the Attorney General, the United States attorneys, and their subordinates have a discretionary power of prosecution that can be exercised against federal judges for the very conduct by which those judges exercise the judicial power in cases to which the Executive is a party. The Executive claims that this power necessarily embraces the power to employ "informant[s], undercover operatives, wire intercepts, electronic surveillance and grand jury process" to investigate judicial conduct it finds suspect.[9] The

---

9. Brief for Appellee United States of America at 42-43, United States v. Hastings; quoted in Hastings Petition at 10.

use of mail intercepts and purchased testimony have been added to the list of claimed powers by this case. As early as 1980, the Justice Department acknowledged that, in the first five years of its existence (1976-1980), the Criminal Division's Public Integrity Section exercised some or all of these claimed powers to investigate alleged criminal conduct by twenty-five federal judges and that, in the year preceding that acknowledgement, it had exercised discretion in declining to prosecute in four instances.[10]

The information that is not known and cannot be discovered is perhaps more important. We do not know how many

---

10. Judicial Tenure and Discipline - 1979-80: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st and 2d Sess. (Comm. Print. 1980), 160 and 160 n.4 (Statement of Maurice Rosenberg, Assistant Attorney General).

federal judges the Public Integrity Section has investigated since 1980, or how many have been formally or informally investigated by local United States attorneys or other federal agencies. The Executive has not reported whether any of these judges have been made aware of the investigations or their results, or if any have been informed of the bases upon which prosecutorial discretion was exercised in their favor. We do not know and cannot know how many citizens now seek to vindicate their constitutional rights before judges who have been made aware that 'there but for the grace of the prosecutor go I'. We do know, however, that at least four investigations and three prosecutions have been initiated since 1980.

There are five hundred United States district judges in active service. Almost

fifty percent of the cases coming before them involve disputes to which the Executive is a party.[11] Daily, these judges must deal with Justice Department attorneys employed to assert the Executive's interests and, on the criminal side, to exercise its powers. Daily, these judges are called upon to accept or reject the work of these attorneys and of the Executive's investigative agencies in controversies affecting the most fundamental rights of the people -- the other parties to those actions. Friction is inevitable. This Court should grant review to determine the extent to which these judges may properly be subjected to the investigative and prosecutorial powers held by the attorneys who represent the Executive before their courts.

---

11. See, e.g., Annual Report of the Director of the Administrative Office of the United States Courts (any year).

II. The Second Question Presented

1. It is precisely that context that makes the second question specially important. Judge Claiborne alleged and offered to prove in the district court that the Executive's decisions to investigate and prosecute him were motivated in fact by an intent to drive him from judicial office and to punish him for the manner in which he had exercised the judicial power in cases to which the Executive had been a party. He claimed that, at a minimum, the Constitution must be construed to afford a federal judge protections comparable to the protections afforded a member of Congress under the speech and debate clause. See, e.g., United States v. Brewster, 408 U.S. 501 (1972) (Speech and debate immunity limited to protect legislative acts from attack). Judge Claiborne asserted that

judges must be protected from exercises of Executive discretion intended directly to undermine the judicial function.

That claim is a separation-of-powers claim. The claim is based upon rights Judge Claiborne holds as a judge, not upon due process rights he holds as an individual. The particular claim has never been addressed by this or any court.[12] The

---

12. In Hastings, the court of appeals recognized that such limited immunity might well be mandated by common-law as well as constitutional principle. 681 F.2d at 711, n.17. Although it did not decide the question, it concluded, "The existence of this limited impunity would further counsel against the creation of the absolute immunity claimed by Judge Hastings." Id.

The special panel that heard Judge Claiborne's first appeal concluded that the district court's refusal to review that claim was not immediately appealable and denied review on that basis. Claiborne I, A. 30-31; see also, Claiborne v. United States, 104 S.Ct. 1463 (stay denied)(Rehnquist, Circuit Justice, in chambers). A different special panel heard the appeal from the conviction and dismissed the claim as "disingenuous" without further discussing the merits. Claiborne II, A. 8-9.

claim should be addressed here.

This Court has invariably recognized the need to maintain the separation of powers necessary to preseve the ability of officers of each branch to execute their core constitutional functions. The Court has consistently found that preserving the appropriate separation requires that some limitations be imposed upon an exercise of powers by one branch where that exercise has inter-branch consequences. The explicit protection provided by the Speech and Debate Clause (U.S. Const., art. I, § 6, cl. 1) were so construed and applied in Brewster.

But this Court has also recognized that a similar balancing of interests is necessary in the absence of explicit protections. Thus, in United States v. Nixon, 418 U.S. 200 (1974), this Court recognized that the nature of the presi-

dential function required that the holder of that office be accorded protections beyond the minimum protections afforded all citizens by the Due Process Clause when the courts were asked to exercise the judicial power to enforce a grand jury subpoena. The Court reached a similar conclusion in holding that the protections established by the Speech and Debate Clause required that limitations be imposed upon the grand jury's power to question a Congressman's staff in Gravel v. United States, 408 U.S. 606 (1972). The Court has also determined that the Constitutional scheme requires that executive officers be afforded such special protections from civil actions in the courts as are necessary to enable them to execute their offices properly, even in the absence of explicit protections. See, e.g., Nixon v. Fitzgerald, 457 U.S. 731

(1982) (President); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (assistant to President); Butz v. Economou, 438 U.S. 478 (1978) (cabinet officer).

The principles underlying those decisions require that a similar analysis and a balancing of interests be undertaken when the Executive determines to exercise its broad prosecutorial powers against an article III judge. In contrast to an executive decision to prosecute an executive officeholder, an intra-branch exercise of power, an executive decision to prosecute a federal judge is an inter-branch exercise of power. The power is one whose exercise must disrupt the courts. It is a power whose exercise clearly can be improperly used. It is a power whose exercise can be used to coerce and whose availability creates the potential for chilling judicial independence.

This Court should undertake the analysis here to determine whether any special protections are necessary to protect a federal judge from exercises of executive power that are motivated and directed against his execution of the judicial office.

2. The admitted facts presented by this case enhance the reasons why review on this question should be granted here. In addition to the separation-of-powers claim presented in this Court, Judge Claiborne filed motions in the district court challenging the prosecution and indictment as the product of abuses of the prosecutors' and the grand jury's powers that could not withstand scrutiny even under the standards this Court has found implicit in the Constitution requirements of a grand jury indictment and of due process. See, e.g., United States

v. Russell, 411 U.S. 423 (1973), and Hampton v. United States, 425 U.S. 484 (1976) (recognizing existence of due process limitations on prosecutorial conduct); see also, e.g., United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974); United States v. Falk, 479 F.2d 66 (7th Cir. 1973) (evidentiary hearing required upon proper allegations of discriminatory bad faith prosecutions). The district court denied those motions without hearing evidence. As the case progressed, however, that court did hold evidentiary hearings on specific abuses of the grand jury that became apparent. Even on the limited record so created, the special panel acknowledged that three strong claims of abuse had been shown -- the use of three consecutive grand juries to obtain indictment (A. 27-31); use of Conforte's suspect testimony before third grand jury to

obtain the indictment that included the tax evasion counts (A. 9-23); and the employment of five IRS and FBI agents as "grand jury agents" (A. 31-40). The panel affirmed the conviction because it held that these abuses were inadequate to satisfy standard imposed when an individual seeks to invalidate an exercise of the prosecutorial discretion or to establish that the trial judge abused his discretion in denying relief.

Thus, it is clear on this record that the Executive did abuse its powers and those of the grand jury in investigating and prosecuting Judge Claiborne. Those findings corroborate the substantiality of Judge Claiborne's other allegations. Because it misperceived the separation-of-powers claim, however, the special panel did not undertake to determine whether separation-of-powers principles

required that the Executive be held to a higher standard when a federal judge alleged that the abuses were motivated by a bad-faith intent to attack him as a judge for the manner in which he exercised the judicial power. This Court should grant review to undertake the analysis and provide authoritative guidance on this question. It should do so before a United States judge who has properly asserted the claim goes to jail.

3. There is also serious intra-branch aspect to the second question. The criminal prosecution of a federal judge must (as it has here) result in substantial disruptions of the judicial business and departures from the accepted and usual course of judicial proceedings.[13] In

13. This is not the first petition that has identified these concerns in this Court. They were developed and set in the context of this Court's decisions in Hastings Petition at 25-27; see also,

itself, given the stakes and the fact that judicial prosecutions appear to have become recurring events, that should be enough to call for guidance from this Court in the exercise of its supervisory powers. But the manner in which this and other cases involving federal judges have been handled has caused concerns about the impartiality of the process within the courts as well as among outside observers.[14]

---

13. (Continued)
Petition for Writ of Certiorari at 20-26, Claiborne v. United States, 105 S. Ct. 113 (1984); Petition for Writ of Certiorari at 36-44, Hastings v. Investigating Committee of the Judicial Council of the Eleventh Circuit, 105 S. Ct. 254 (1984) (all denied). This is, however, the first petition to present those concerns to this Court on a record that concretely demonstrates them.

14. See, e.g., Claiborne II, A. 127-35 (Fergeson, circuit judge, dissenting from denial of rehearing en banc)(concluding that the decisions in this case raise the concern), and Hastings v. Judicial Conference of the United States, 707 F.2d 1093, 1104-05 (D.C. Cir. 1985)(Edwards, circuit

As Judge Ferguson's dissent makes clear, a fair review of the record demonstrates that the concerns are concretely presented here. However the balance is to be struck, only this Court can do the striking. The issue is not whether the Court will have to address and resolve these questions; it is when. Petitioner respectfully submits the time is now.

---

14 (Continued)

judge, concurring in result)(eloquently expressing similar concerns in a related context); see also, e.g., J. Riley The Deal Conforte Cut: Is it Legal, Nat'l L.J., Jan. 23, 1984, at 30 (questioning judicial cooperation necessary to enable prosecutors to obtain fugitive brothel owner's testimony to prosecute federal judge), and D. Pike, Judicial Discipline on Trial, Nat'l L.J., Dec. 19, 1983, at 1, 26-27 (commenting upon reactions to disciplinary proceedings against Judge Hastings and differences in rules adopted by different circuits); see also, Notes, Indictment of Federal Judges: Chilling Judicial Independence, 35 U. Fla. L. Rev. 296 (1983).

III. The Third Question Presented

1. This case presents the Court with an important opportunity to clarify the standards that the lower courts are to apply in determining whether the post-trial discovery of material evidence that was withheld requires that the defendant be afforded a new trial. In United States v. Bagley, 105 S.Ct. 3375 (1985), the Court held that the withholding of impeachment evidence did not require automatic reversal under Davis v. Alaska, 415 U.S. 309 (1974). It reversed the court of appeals's decision on that basis and remanded the case to the court of appeals to determine "whether there is a reasonable probability that, had [the withheld information] been disclosed to the defense, the result of the trial would have been different." Bagley, 105 S.Ct.at 3385. Six Justices further agreed

that the correct standard required reversal "only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." Id. at 3381. This Court did not, however, itself apply the standard, and the courts of appeals and district courts have not received any authoritative guidance illustrating how the standard is to be applied.

The present case presents a proper record for this Court to provide the necessary guidance. The offense charged required that the prosecution prove the defendant's state of mind beyond a reasonable doubt -- to prove that the defendant willfully intended not to disclose a portion of his income at the time he signed the returns that his accountants had prepared. Because Judge Claiborne took the stand and testified that he had

disclosed the income to his accountants and had relied upon their judgment, the prosecution had to satisfy the jury beyond a reasonable doubt that Judge Claiborne was lying. The strongest single piece of evidence that Judge Claiborne produced to corroborate his testimony was the April 11, 1980, letter by which he testified that he had disclosed the unreported income to Wright, the accountant who prepared the 1979 return. His secretary testified she delivered the letter to Wright. If the jury believed this testimony, it is highly probable, seemingly almost certain, that it would have found Judge Claiborne not guilty on that count. Moreover, the jury would have had additional evidence tending to support Judge Claiborne's testimony that he acted in good faith in relying upon Watson after having made similar disclosures in 1981,

creating a substantially enhanced probability that he would not have been convicted on that count.

The prosecution sought to establish beyond a reasonable doubt that Judge Claiborne had lied by introducing Wright's testimony. Wright testified unequivocally that he had no recollection of ever having seen the 1980 letter. More damning, Wright testified on cross-examination that to his recollection "no document was ever lost in [his] office" and "no document relating to Judge Claiborne's tax matters was ever lost or mislaid in [Wright's] office." The factual questions thus presented were so close that, with similar testimony before it, the first jury had been unable to reach a verdict on either count.

The present petition asks this Court to give content to the Bagley standard by

applying it to a concrete set of facts. Prior to Wright's testimony the government had submitted the summaries prepared by FBI and IRS agents to the trial judge. In those summaries, the agents reported that Wright had told them that by 1981 he had concluded that Claiborne had retained another accountant and that, when Wright had moved offices that year, he had thrown out copies of customer receipts from Judge Claiborne's former practice and the pre-1976 journals that the Wrights had prepared for Judge Claiborne's law practice.

That information was clearly material. Defense counsel could have used it to undermine Wright's credibility on cross-examination or by calling the agents to testify that he had given them prior statements that were inconsistent with his testimony at trial. Moreover, the interviews had taken place a year-and-a-half

before the trial, when Wright's recollections should have been fresher. With the statements, defense counsel could have presented evidence providing a basis from which jurors might have inferred that there was a reasonable possibility that the 1980 letter was lost or thrown out when Wright moved offices in 1981. The jury would have been required to consider both possibilities in determining whether the prosecution had excluded every reasonable doubt about Judge Claiborne's state of mind at the time he signed the returns.

This Court should grant review to determine whether a court of appeals may find a lack of the requisite prejudicial effect when the trial court had withheld evidence that undermines the crucial testimony of a key prosecution witness in a close case. In so doing, it would give content to a standard that whose proper

administration is fundamental to preserving the trial as a search for correct and just results.

2. There is a further reason why this Court should grant review to consider the third question in this case. The procedures followed and the standards applied in the courts below substantially departed from the procedures and standards that are the normal incidents of a fair trial. Neither the trial judge nor the special panel independently reviewed many of the submitted documents, and that was wrong. The trial court and the special panel ruled as a matter of law that unexamined summaries of witness statements prepared by FBI and IRS agents were not "statements" within the meaning of the Jencks Act. This determination was made without affording the defense any opportunity to inquire to determine the

accuracy of the summaries, or whether the witness had read or adopted them. The decision and the procedure by which it was reached were wrong. The court of appeals ruled that withholding summaries suggesting that a key prosecution witness may have perjured himself in giving crucial testimony against the defendant did not prejudice the defendant sufficiently to require a new trial. That decision was wrong.

The failure of either court to conduct a de novo review of the documents submitted and the failure of the trial court to examine or disclose their existence at a time that would have permittted some inquiry into the circumstances in which the summaries of the witness statements were prepared seemingly conflict with this Court's decisions in Campbell I and Goldberg. In determining that the trial

court's failure to disclose the summaries of the accountant's statements did not require a new trial, the special panel failed to apply the standard this Court articulated in Bagley. Moreover, the panel adopted a construction of this Court's decisions in Brady and United States v. Agurs, 427 U.S. 97 (1976), that would render the values that underlie those decisions largely illusory. These decisions alone were departures from the standards that this Court has found necessary to preserve a fair criminal trial system. As a precedent, the panel's opinion approves procedures and standards that can only produce mischief and error in future cases. Standing alone those factors would fully justify review in this Court.

Accordingly petitioner submits that constitutional considerations justify review in this case. We ask that the Court grant his petition.

Respectfully submitted,

Robert S. Catz
Cleveland, Ohio

Terence J. Anderson
Counsel of Record
c/o University of Miami
School of Law
Coral Gables, Florida
33124-8087
(305) 284-2971

Oscar B. Goodman
Las Vegas, Nevada

attorneys for petitioner.